FILED BY CLERK
JUN -2 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

IN RE DELILAH C.	2 CA-JV 2010-0016 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF GRAHAM COUNTY

Cause No. J-6227

Honorable D. Corey Sanders, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART AND REMANDED

Kenneth Angle, Graham County Attorney
By Leslie J. Capace
Safford
Attorneys for State

Harriette P. Levitt
Tucson
Attorney for Minor

E S P I N O S A, Presiding Judge.

¶1 Seventeen-year-old Delilah C. appeals the juvenile court's January 2010 order adjudicating her delinquent after finding she had committed resisting arrest, aggravated assault, and possession of drug paraphernalia, and placing her on probation until her eighteenth birthday. She argues the court abused its discretion in denying her

motion to suppress evidence and to dismiss the delinquency petition. She also contends the court committed fundamental error when it admitted hearsay testimony and maintains the evidence was insufficient to support the court's findings of delinquency. For the following reasons, we affirm the court's order adjudicating Delilah delinquent for resisting arrest and aggravated assault, but vacate that portion of the order finding she had committed possession of drug paraphernalia.

¶2 On appeal, we view the evidence presented at the adjudication hearing in the light most favorable to upholding the juvenile court's order. *See In re John M.*, 201 Ariz. 424, ¶ 7, 36 P.3d 772, 774 (App. 2001). Safford police officer Herschel Medlin went to Susan F.'s mobile home to investigate a report that her son, Mitchell F., had been selling illegal drugs. Medlin learned that a warrant had been issued for Mitchell's arrest because he had failed to pay fines. When Medlin arrived, Delilah and Mitchell were outside the mobile home, but Delilah went inside as Medlin began questioning Mitchell. Mitchell denied being involved in drug sales and began emptying his pockets, placing his wallet, cigarettes, and other items on a box next to the mobile home's entrance. He then told Medlin he would not submit to a search unless Medlin had a search warrant. Medlin informed Mitchell about the arrest warrant and placed him under arrest, handcuffing his hands behind his back.

¶3 As he was being handcuffed, Mitchell called out to Delilah to "grab [his] stuff," and she appeared at the door of the mobile home. Medlin told Delilah to get back and "not to touch [Mitchell's] stuff." Delilah reached down and picked up Mitchell's wallet, and Medlin grabbed her arm and told her repeatedly to drop the wallet. Delilah

did not drop the wallet, but "began yanking her arm back, swinging her arm" at the officer. Medlin told Delilah she was under arrest and pulled her down the steps that led to the door of the mobile home, placed her on the ground, handcuffed her, and secured her in the back of his patrol vehicle. Throughout the arrest, Delilah "was still kicking, screaming, pushing, shoving, [and] carrying on with her legs," striking Medlin in the process. After Medlin put Delilah in the patrol vehicle, she continued to yell and repeatedly banged her head against the plexiglass barrier and kicked at the door. Medlin requested backup police assistance and emergency medical services (EMS), and Delilah was taken to a hospital.

¶4 While Medlin was waiting for the EMS team, Susan arrived and gave him permission to walk through the mobile home. In the far west bedroom of the home, Medlin observed a plate containing what he identified as "marijuana residue, stems, [and] seeds" and a "marijuana bong," identified as a "marijuana smoking device," that smelled of burned marijuana.

¶5 Susan told Medlin that Delilah, Mitchell's girlfriend, had been staying in the mobile home's living room with Mitchell and had a dresser in the far west bedroom where she kept her belongings. After Medlin obtained a warrant authorizing the hospital to release a sample of Delilah's urine, a Safford police detective performed a field test that indicated the sample was positive for the presence of tetrahydrocannabinol, the active ingredient in marijuana.

¶6 Although Susan did not testify at the adjudication hearing, her neighbor, Tony S., testified he had seen Delilah entering and leaving the mobile home by herself

for at least a "couple of months" before her arrest. And Darlene C., who testified she was "[l]ike a stepmother" to Delilah, stated Delilah would "stay some nights" at Susan's mobile home, sometimes for a week at a time.

¶7 In her motion to suppress evidence and dismiss the charges, Delilah argued her arrest was illegal and, therefore, (1) she had the right to resist Medlin with physical force, (2) her use of force was justified because any force Medlin had used to effect an illegal arrest was necessarily excessive, and (3) the court was required to "suppress[] all evidence obtained following her illegal arrest," including the urine test obtained pursuant to a search warrant. The juvenile court denied Delilah's motion after a hearing, finding Medlin had a right to conduct a search incident to Mitchell's arrest when executing the arrest warrant and had probable cause to arrest Delilah for refusing to aid a police officer in effectuating or securing an arrest, in violation of A.R.S. § 13-2403(A).[1]

¶8 At the close of the delinquency adjudication hearing, Delilah argued the evidence was insufficient to establish her constructive possession of drug paraphernalia. Although she had not objected to Medlin's testimony about what Susan had told him, she noted that Susan's statements were hearsay evidence. The court found the state had met its burden of proof on charges of resisting arrest, aggravated assault, and possession of

[1]Section 13-2403(A) provides:

> A person commits refusing to aid a peace officer if, upon a reasonable command by a person reasonably known to be a peace officer, such person knowingly refuses or fails to aid such peace officer in:
>
> 1. Effectuating or securing an arrest; or
> 2. Preventing the commission by another of any offense.

drug paraphernalia, adjudicated Delilah delinquent, and placed her on probation until her eighteenth birthday. Based on its finding of delinquency for possession of drug paraphernalia, the court further directed that Delilah be precluded from obtaining her driver license until she turned eighteen. *See* A.R.S. § 28-3320(A)(6), (E) (Department of Transportation "shall . . . refuse to issue a driver license . . . . [u]ntil the person's eighteenth birthday" on receiving record of delinquency adjudication based on "violation of any provision of title 13, chapter 34").

¶9 On appeal, Delilah asserts the same arguments she raised at the adjudication hearing, and also argues the juvenile court committed fundamental, prejudicial error in admitting hearsay evidence of Susan's statements to Medlin.

Denial of Motion to Dismiss or Suppress Evidence

¶10 Delilah argues that her arrest was illegal, that her use of force in resisting arrest was therefore justified, and that the juvenile court consequently erred in denying her motion to dismiss the charges against her.[2] We review a trial court's ruling on a

[2]In support of this argument, Delilah relies, as she did below, on *State v. Snodgrass*, 117 Ariz. 107, 570 P.2d 1280 (App. 1977), and *State v. Robinson*, 6 Ariz. App. 424, 433 P.2d 75 (1967). Like other Arizona courts, we question the continued validity of Delilah's proposition in light of our supreme court's discussion in *State v. Hatton*, 116 Ariz. 142, 147-49, 568 P.2d 1040, 1045-47 (1977) ("question[ing] a blanket right to resist [unlawful] arrest"). *E.g., State v. Windus*, 207 Ariz. 328, ¶ 16 & n.3, 86 P.3d 384, 387 & n.3 (App. 2004) (declining to suppress evidence of defendant's resistance to arrest that ensued after police unlawfully entered premises); *State v. Sanders*, 118 Ariz. 192, 196, 575 P.2d 822, 826 (App. 1978) (suggesting right to resist unlawful arrest "no longer the law in Arizona" after *Hatton*); *see also State v. Mincey*, 130 Ariz. 389, 411, 636 P.2d 637, 659 (1981) (noting Arizona courts have "question[ed] whether there even remained a right to resist an unlawful arrest"); *cf.* A.R.S. § 13-404(B)(2) (justification defense unavailable for resistance to "lawful or unlawful" arrest unless in response to excessive force by officer).

motion to dismiss criminal charges for an abuse of discretion, but review questions of statutory interpretation and constitutional law de novo. *State v. Ramsey*, 211 Ariz. 529, ¶ 5, 124 P.3d 756, 759 (App. 2005).

¶11 According to Delilah, Medlin lacked probable cause to arrest her for failing to aid him in "[e]ffectuating or securing an arrest" or preventing the commission of a crime, § 13-2403(A), because Mitchell had already been arrested when, at his request, Delilah took the wallet off of the box where he had laid it, and no crime was afoot in the vicinity. She discounts Medlin's testimony that he was concerned the wallet might contain a weapon, such as razor blades or "throwing stars," because the wallet ultimately was found to contain neither weapons nor contraband and was not retained as evidence. And, she maintains, Medlin "didn't command [her] to assist him in effectuating an arrest or in preventing the commission of a crime. He commanded her to drop a wallet."

¶12 Because we find no error, we will not disturb the court's denial of Delilah's motion to dismiss or to suppress evidence. Another department of this court has rejected the argument that a defendant's arrest is necessarily effected when the defendant is restrained or placed in handcuffs, precluding a guilty verdict for resisting arrest based on the defendant's subsequent threat or use of force against a peace officer. *State v. Mitchell*, 204 Ariz. 216, ¶¶ 11-14, 62 P.3d 616, 618 (App. 2003). Construing the legislature's use of the phrase "effecting an arrest" in A.R.S. § 13-2508, the court in *Mitchell* stated,

> "[E]ffecting an arrest" is a process with a beginning and an end. [*Lewis v. State*, 30 S.W.3d 510, 512 (Tex. App. 2000).] Often, the process is very brief and the arrest is quickly completed. In some situations,

> however, the process of "effecting" an arrest will occur over a period of time and may not be limited to an instantaneous event, such as handcuffing.
>
> . . . .
>
> . . . While an arrest as defined by [A.R.S.] § 13-3881 is characterized by actual restraint or submission, the phrase "effecting an arrest" in § 13-2508 connotes successful, effective restraint or submission of the person.

Id. ¶¶ 13, 15.

¶13 The language in § 13-2403(A), requiring compliance with a peace officer's reasonable command for assistance in "[e]ffectuating or securing an arrest," similarly connotes a process that is ongoing until the arrestee is successfully restrained. Although Mitchell had been handcuffed when Delilah reached to get his wallet, his arrest had not yet been successfully accomplished. As the state points out, there was evidence that Mitchell, while handcuffed, reached over to the same box where his wallet had been sitting and picked up his cigarettes, while Medlin was struggling to persuade Delilah to drop the wallet. It was appropriate for Medlin to attempt to secure the wallet against possession by either Mitchell or Delilah, at least until he could search it for weapons. *Cf. Michigan v. Long*, 463 U.S. 1032, 1049, 1051-52 (1983) (during investigative stop, officer may search vehicle's passenger compartment upon reasonable suspicion that dangerous individual could "gain immediate control of weapons"). His commands to Delilah to stay back, to refrain from touching Mitchell's belongings, and then to drop Mitchell's wallet after she had seized it, were all reasonable requests designed to aid Medlin in safely effectuating and securing Mitchell's arrest. Delilah failed to comply with those commands. We find no error in the juvenile court's application of the law and no abuse of discretion in its ruling that Delilah had been lawfully arrested.

Resisting Arrest and Aggravated Assault

¶14 Delilah argues there was insufficient evidence to support the juvenile court's finding that she had committed the offenses of resisting arrest or assault. In reviewing the sufficiency of the evidence, we resolve all reasonable inferences in support of the court's judgment and "determine *de novo* . . . whether the evidence before the court 'existed in sufficient quantity so that any rational trier of fact' could find beyond a reasonable doubt that the juvenile had committed the offense." *In re Jessi W.*, 214 Ariz. 334, ¶ 11, 152 P.3d 1217, 1219 (App. 2007), *quoting In re William G.*, 192 Ariz. 208, 212, 963 P.2d 287, 291 (App. 1997). We do not reweigh the evidence, and we will reverse a decision for insufficient evidence only "if there is a complete absence of probative facts to support the judgment or if the judgment is contrary to any substantial evidence." *In re John M.*, 201 Ariz. 424, ¶ 7, 36 P.3d 772, 774 (App. 2001).

¶15 Because we have found the juvenile court did not err in determining Delilah's arrest was lawful, we have necessarily resolved her argument that she was justified in using physical force to resist an illegal arrest. Citing testimony that she had been "in a panic" or "out of control" when Medlin had arrested her, Delilah argues the state failed to prove she had "knowingly" touched Medlin with the intent to injure, insult, or provoke him. *See* A.R.S. § 13-1203(A)(3). We reject this argument.

¶16 The state is required to prove every element of a crime, including any required mental state, beyond a reasonable doubt. *State v. Edmisten*, 220 Ariz. 517, ¶ 6, 207 P.3d 770, 773 (App. 2009); *see also In re Robert A.*, 199 Ariz. 485, ¶ 14, 19 P.3d 626, 629 (App. 2001). But "[w]e recognize that absent a person's outright admission

regarding his state of mind, his mental state must necessarily be ascertained by inference from all relevant surrounding circumstances." *William G.*, 192 Ariz. at 213, 963 P.2d at 292; *cf. State v. Routhier*, 137 Ariz. 90, 99, 669 P.2d 68, 77 (1983) ("Criminal intent, being a state of mind, is shown by circumstantial evidence. Defendant's conduct and comments are evidence of his state of mind."). In addition to Medlin's statements at the hearing, Susan's neighbor Tony testified that when Medlin tried to arrest Delilah, "She—as little as she is, she did not hold up to this guy. She beat him up. She—she was profusely banging on him. . . . [S]he was hitting him. He—he wasn't hitting her." The court reasonably could have inferred from this and other testimony that Delilah knowingly touched Medlin with the intent to injure, insult, or provoke him. We conclude the evidence was sufficient to support the court's finding that Delilah acted knowingly.

Possession of Drug Paraphernalia

¶17 Delilah also maintains the evidence was insufficient to find her delinquent on the charge of possession of drug paraphernalia. In addition, relying on *Crawford v. Washington*, 541 U.S. 36 (2004), she argues the juvenile court committed fundamental, prejudicial error in admitting testimonial hearsay evidence of Susan's statement to Medlin, in violation of her Sixth Amendment right to confront witnesses against her. Because her second argument is dispositive of our review of the court's finding on this charge, we do not consider her claim that the evidence was insufficient to support the court's finding.

¶18 Delilah appears to acknowledge that, absent fundamental error, she has forfeited review of the court's admission of Medlin's testimony about his interview with

Susan. She argues fundamental error occurred because Susan's statements provided "the sole evidence" that Delilah had "'dominion and control'" over the drug paraphernalia. *See State v. McGann*, 132 Ariz. 296, 299, 645 P.2d 811, 814 (1982) (hearsay erroneously admitted without objection reviewed for fundamental error; "When hearsay evidence is the sole proof of an essential element of the state's case, reversal of the conviction may be warranted."[3]). Specifically, she notes Susan's statement, as reported by Medlin, was the only evidence that Delilah "had a dresser with her own belongings in a bedroom where drug paraphernalia was found." In response, the state asserts Susan's statements were not hearsay or were cumulative of other evidence, and further contends "the admission of hearsay evidence does not rise to the level of fundamental error." The state does not address Delilah's argument that admission of the evidence violated her Sixth Amendment right of confrontation under *Crawford*.

¶19 To prevail on a claim of fundamental error, Delilah must first establish that error occurred, and then show that the error "goes to the foundation of h[er] case, takes away a right that is essential to h[er] defense, and is of such magnitude that [s]he could not have received a fair trial." *State v. Henderson*, 210 Ariz. 561, ¶¶ 23, 24, 115 P.3d 601, 608 (2005).

[3]We regard this statement in *McGann* to be illustrative, rather than limiting. In *McGann*, our supreme court reversed a conviction for four counts of forgery based on the erroneous admission of evidence that McGann had committed fifty-seven prior acts of forgery, introduced in support of McGann's identity and opportunity to commit the four offenses charged. 132 Ariz. at 298, 645 P.2d at 813. Although the inadmissible hearsay was the only evidence introduced of those prior crimes, it was not the "sole proof of an essential element" of the forgeries at issue in McGann's trial. *Id.* at 299, 645 P.2d at 814. The court nonetheless reversed for fundamental error, finding the jury had likely relied on the inadmissible evidence in reaching its verdicts. *Id.*

¶20 As an initial matter, we agree with Delilah that the admission of Susan's statements through Medlin's testimony was error. Susan's statements were hearsay because she did not testify at the delinquency hearing, and her statements were admitted to prove the truth of her assertions. *See* Ariz. R. Evid. 801(c). The state does not argue the statements fall within any exceptions to the rule precluding the admission of hearsay, *see* Ariz. R. Evid. 802, 803, 804, and we find no basis for their admission. Moreover, even if Susan's statements had been admissible under evidentiary rules, we conclude their admission violated Delilah's Sixth Amendment right of confrontation under the rule announced in *Crawford*.

¶21 "The Confrontation Clause [of the United States Constitution] prohibits the admission of testimonial hearsay unless (1) the declarant is unavailable and (2) the defendant 'had a prior opportunity to cross-examine' the declarant." *State v. Armstrong*, 218 Ariz. 451, ¶ 32, 189 P.3d 378, 387 (2008), *quoting Crawford*, 541 U.S. at 59. In *Crawford*, the Court explained "[s]tatements taken by police officers in the course of interrogations" are among the "core class" of testimonial statements that are inadmissible absent an opportunity for cross-examination, because the introduction "of *ex parte* examinations as evidence against the accused" is the "principal evil" addressed by the Confrontation Clause. 541 U.S. at 50-52, 68. Although statements made in response to efforts by the police to assist in an ongoing emergency are not testimonial, statements "are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the [police] interrogation is to

establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006).

¶22 In applying *Crawford*, another division of this court has rejected the argument that a police officer's preliminary field investigation lacks sufficient formality or structure to yield testimonial responses. *State v. Parks*, 211 Ariz. 19, ¶¶ 44, 46, 49, 116 P.3d 631, 640-42 (App. 2005). According to *Parks*, "Questioning during a field investigation when there are no 'exigent safety, security and medical concerns' that has as its objective the production of evidence or information for a possible prosecution, is within the core concerns of the Sixth Amendment just as is a formal witness interview at a station house." *Id.* ¶ 49, *quoting People v. Kilday*, 20 Cal. Rptr. 3d 161, 172 (Ct. App. 2004).

¶23 Here, Medlin testified that Susan arrived home after Mitchell and Delilah had been arrested and he "kind of briefed her and asked her, you know, Who lives here? What's going on?" Susan then gave Medlin permission to conduct a "walk-through" search of her mobile home, and the two continued their conversation. Because Susan's statements were elicited to "establish or prove past events potentially relevant to later criminal prosecution," *Davis*, 547 U.S. at 822, and not to assist with an ongoing emergency, we conclude they were testimonial hearsay and their admission was constitutional error.[4]

[4]As we observed in *State v. Alvarez*, 213 Ariz. 467, ¶ 15, 143 P.3d 668, 672 (App. 2006), "the Court in *Davis* apparently shifted the focus from the motivations or reasonable expectations of the declarant to the primary purpose of the interrogation." In applying the test announced in *Davis*, we therefore focus on Medlin's purpose in

¶24 Further, we agree with Delilah that the error was fundamental. Susan's statements about Delilah's access to the mobile home and, in particular, to the room where drug paraphernalia was found, were highly probative of whether Delilah had exercised dominion or control over the paraphernalia such that her constructive possession of it had been proven. *See* A.R.S. § 13-105(33) ("'[p]ossess'" defined as "knowingly . . . exercis[ing] dominion or control over property"). And, as the Court explained in *Crawford*, "[T]he [Confrontation] Clause[] . . . is a procedural rather than a substantive guarantee. It commands . . . that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. Because Susan's statements went to the foundation of Delilah's defense and were admitted in contravention of her right of cross-examination, a right essential to her defense, Delilah has established that fundamental error occurred. To prevail on appeal, however, Delilah "must establish both that fundamental error exists and that the error in h[er] case caused h[er] prejudice," by showing that, absent the erroneous admission of Susan's statements, the juvenile court "could have reached a different result." *Henderson*, 210 Ariz. 561, ¶¶ 20, 26-27, 115 P.3d at 607, 609.

¶25 Because there was no evidence that Delilah was in actual physical possession of drug paraphernalia, the state proceeded on a theory of constructive

---

questioning Susan, rather than her expectation regarding future testimony. *See also Parks*, 211 Ariz. 19, ¶ 50, 116 P.3d at 642 ("If, for example, the police have arrested the alleged assailant, have secured the crime scene, and are in the process of obtaining information regarding a crime, a reasonable person may believe or expect the government to use what he or she tells the police in the investigation and prosecution of the assailant.").

possession. "To prove constructive possession, the state must show by specific facts or circumstances that the defendant exercised dominion or control over the drugs, although the drugs were not found in his presence." *State v. Villalobos Alvarez*, 155 Ariz. 244, 245, 745 P.2d 991, 992 (App. 1987). Where, as here, the evidence of constructive possession is wholly circumstantial, a fact-finder must determine whether the "totality of circumstances . . . add up to proof beyond a reasonable doubt." *State v. Fulminante*, 193 Ariz. 485, ¶ 26, 975 P.2d 75, 84 (1999); *see Villalobos Alvarez*, 155 Ariz. at 245-46, 745 P.2d at 992-93 (collecting cases addressing sufficiency of evidence to establish constructive possession).

¶26 In this case, the juvenile court made specific findings on the charge of possession of drug paraphernalia at the close of the adjudication hearing, stating,

> [T]he Court finds under the definition of possession under Arizona Revised Statutes that it does allow dominion and control. The Court does find that Delilah C[.] had substantial amount of time in the residence, that even though I do not believe the State has proven that she actually owned the items, that she did have sufficient access to those items, knowledge of those items that would allow her to exercise dominion over the items that were specifically on the dresser [in the west bedroom]. . . . I do believe specifically that . . . those items that were in plain view on the dresser would have been under her dominion or control . . . .

Delilah's counsel then interrupted the court and asked, "[A]s far as the items found in the west bedroom, is the Court finding that Delilah C[.]—there's evidence that Delilah C[.] ever entered the west bedroom?" The court responded,

> I'm finding that she had enough access to the . . . residence and that she would have had the opportunity and not only the opportunity, but that she would have been able to

> exercise dominion and control over the period of time that she was there, that she did have a dresser in there, that . . . Susan F[.] identified the dresser as having her belongings in there and that she had been staying there. I believe that that would give us . . . enough factual basis for the State . . . to convince me beyond a reasonable doubt.

Thus, the court expressly relied on Susan's statement that Delilah "had a dresser" in the west bedroom where she kept her belongings. Delilah has therefore shown that, without the erroneous admission of Susan's testimony, the court "could have reached a different result" and has thus met her burden of showing fundamental, prejudicial error. *Henderson*, 210 Ariz. 561, ¶¶ 20, 26-27, 115 P.3d at 607, 609.

¶27 The state appears to argue that Delilah was not prejudiced by Susan's statements because they "were cumulative of other evidence presented to the trial court . . . that [Delilah] frequently stayed at the F[.] residence and used the far west bedroom." *See State v. Fulminante*, 161 Ariz. 237, 245-46, 778 P.2d 602, 610-11 (1988) (error harmless when inadmissible evidence cumulative to properly admitted evidence). Although we agree that other evidence may have established that Delilah spent substantial time at the mobile home and frequently spent the night, the only evidence connecting Delilah to the home's west bedroom was Susan's statement that Delilah kept a dresser in the room and it contained her belongings.[5]

[5]Despite the state's assertion that "Medlin located a dresser containing [Delilah]'s clothing . . . in the far west bedroom," when asked about the contents of the dresser, Medlin testified, "[A]s far as remembering what was in that dresser, I have no idea what was in there other than clothes." He could not recall the type of clothes or, specifically, whether the dresser appeared to contain a "young female[']s] clothes."

¶28 Moreover, although the state maintains the juvenile court "had sufficient evidence to find delinquency [for possession of drug paraphernalia] even in the absence of the hearsay evidence," our review for prejudicial error is not the same as our review for sufficiency of the evidence. In reviewing the latter, we will affirm if any rational trier of fact could have found the defendant guilty based on "[any] hypothesis whatever." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987). In contrast, to determine whether fundamental error is prejudicial, we must inquire whether an appellant has shown that, without the error, the fact-finder in her case might have acquitted her. *See Henderson*, 210 Ariz. 561, ¶¶ 38-39, 115 P.3d 601, 610-11 (Hurwitz, J., concurring) (notwithstanding defendant's burden of proof, "the fundamental error test for prejudice . . . is for practical purposes no different" than harmless error test for claim of constitutional error preserved for appeal); *cf. State v. Bible*, 175 Ariz. 549, 590, 858 P.2d 1152, 1193 (1993) (reviewing courts "do not, and cannot, find harmless error based on our idea of guilt or innocence or whether there is sufficient proper evidence to convict"), *citing Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (consideration on review for harmless error "not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand"); *State v. May*, 210 Ariz. 452, ¶¶ 24-26, 112 P.3d 39, 45-46 (App. 2005) (distinguishing reversal for trial error for erroneous admission of hearsay from reversal for insufficient evidence for purpose of retrial).

¶29 Here, the juvenile court expressly relied on inadmissible, testimonial hearsay to find Delilah had a dresser containing her belongings in the west bedroom of

the mobile home and to conclude Delilah had exercised dominion and control over the drug paraphernalia found there.[6] The evidence was not cumulative, because no other evidence supported the court's finding that a dresser in the bedroom belonged to Delilah. Delilah has therefore made an adequate showing of fundamental, prejudicial error to sustain her claim.

Conclusion

¶30 For the foregoing reasons, we affirm the juvenile court's adjudication of delinquency based on the charges of resisting arrest and aggravated assault. However, we vacate that portion of the court's order finding Delilah had committed the offense of possession of drug paraphernalia. Because the latter charge was one of the bases for the adjudication and may have affected the disposition, we remand the case for any further proceedings the juvenile court deems necessary.

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

JOSEPH W. HOWARD, Chief Judge

VIRGINIA C. KELLY, Judge

[6]Because Delilah's claim of prejudice is consistent with express statements by the juvenile court, it does not rest on mere speculation. *Cf. State v. Munninger*, 213 Ariz. 393, ¶ 14, 142 P.3d 701, 705 (App. 2006) (defendant fails to meet burden of showing prejudice when prospect of different result based on speculation having "no support in the record").